FILE COPY

Office-Supreme Court, U.S.
FILED
DEC 1
JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 546

CITY OF MERIDIAN
APPELLANT

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY
APPELLEE

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH DISTRICT

APPENDIX TO STATEMENT AS TO JURISDICTION

TABLE OF CONTENTS OF APPENDIX

	Page
Opinion of Court of Appeals, Fifth Circuit, in *City of Meridian v. Southern Bell Telephone and Telegraph Company*	1
The Judgment of the District Court (see Note 1)	3
Opinion of the District Court in *Southern Bell Telephone and Telegraph Company v. City of Meridian*	13
Chapter 38, Mississippi Laws of 1886	28
Chapter 135, Mississippi Laws of 1878	39
2 Missouri Revised Statutes, 1885, page 520	51
Opinion of the Supreme Court of Mississippi in *Hodges, City Tax Collector, v. Western Union Telegraph Company*	56

IN THE SUPREME COURT OF THE UNITED STATES

No._____

CITY OF MERIDIAN
APPELLANT

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY
APPELLEE

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1958

Before HUTCHESON, Chief Judge, and TUTTLE and WISDOM, Circuit Judges.

HUTCHESON, Chief Judge: Brought by Appellee against the City of Meridian under Sec. 2201, U.S.C., the suit was for a declaratory judgment that Sec. 5(e) of House Bill 123, Chapter 372, Mississippi Laws of 1956, insofar as it requires plaintiff to pay two percent of the monthly service charges within its boundaries as compensation for use of its streets, alleys, and other public places, was unconstitutional and invalid.

The claim was.

1. That the plaintiff holds a perpetual and irrevocable grant from the State of Mississippi to use and occupy all highways and streets in the City of Meridian, Mississippi, without paying compensation therefor; that this grant is a contract which is protected under the contract clauses of the State and Federal Constitutions and which cannot be impaired by the imposition of additional burdens such as the exaction of compensation. We, of course, recognize the right of the City to make reasonable regulations under the police power.

2. That insofar as the statute relied upon by the City (Sec. 5(e) Chapter 372, Mississippi Laws of 1956) requires plaintiff to pay compensation to the City for the use of the streets, said statute constitutes an unconstitutional attempt to impair the obligations of the contract between plaintiff and the State of Mississippi.

Appellant filed an answer and counter-claim, admitting the enactment of Chapter 38 of the Mississippi Laws of 1886 and the construction, extension and expansion of the telephone plant and facilities of the appellee's predecessors in title subsequent to the enactment of said Chapter 38, but denying that this extension or expansion was conducted under Chapter 38 of the Mississippi Laws of 1886, and denying that Chapter 38 of the Mississippi Laws of 1886 constituted an offer of a franchise. Appellant further denied that appellee succeeded to any rights under Chapter 38 of the Mississippi Laws of 1886. It, however, admitted

that it was seeking to collect two percent of appellee's monthly service charges in said municipality. Defendant's counter-claim asked that appellee be required to discover the amount of its monthly service charges in the City of Meridian for the period from March 29, 1956, through December 31, 1956, and subsequent thereto during the pendency of this action, and that judgment be rendered against appellee for two percent of the total of said service charges.

Upon the issues thus drawn by the pleadings, the case was tried to the court without a jury on stipulations of fact and documentary evidence, and at the conclusion of the trial the district judge, making and filing an opinion, *Southern Bell Telephone & Telegraph Co. v. City of Meridian*, 154 F. Supp. 736, in which he set out the uncontroverted facts and canvassed and discussed the applicable decisions upon which he based his determination, entered judgment[1] for plaintiff, and the City appealed.

---

[1] "This cause came on this day to be heard on evidence submitted to the Court and briefs of counsel, and the Court having heard and considered the same doth order, adjudge, decree and declare as follows:

"1. That Chapter 38, Mississippi Laws of 1886, constituted an offer by the State of Mississippi which was accepted by the acts of Southern Bell Telephone and Telegraph Company and its predecessors in title by the continued maintenance, construction, extension and expansion of telephone facilities on and along the public highways and streets of the State continuously during each and every year subsequent thereto to date.

"2. That this offer and acceptance resulted in a contract by virtue of which Southern Bell Telephone and Telegraph Company acquired a vested right to use all present and future highways and streets of the State of Mississippi for the purpose of constructing and maintaining its telephone lines and communication facilities without payment of compensation therefor; and Southern Bell Telephone and Telegraph Company holds a valid and subsisting perpetual and irrevocable grant from the State of Mississippi

Here, stating:

> "There is essentially only one question involved in this case, to-wit whether or not Chapter 38 of the Mississippi Laws of 1886 constituted an offer by the State of Mississippi which, when accepted, resulted in a contract between the State and the telephone companies accepting the offer which cannot be impaired by subsequent legislation, and whether or not appellee is entitled to succeed to any right under said Chapter 38."

appellant assigns a single error, that the district judge erred in granting plaintiff the declaratory judgment as prayed and in denying the defendant's counter claim for a decree requiring appellant to discover the amount of its monthly service charges and to pay appellant two percent of the total of such charges. Beginning its argument with the statement:

> "All of the facts in this case are stipulated and there is no dispute about such facts, although there

---

for the use and occupancy of all the highways, streets, and roads of Mississippi, including municipal streets, without paying compensation therefor.

"3. That Chapter 372, Mississippi Laws of 1956, is beyond the power of the Legislature of the State of Mississippi and in conflict with the Constitution of the State of Mississippi and the Constitution of the United States, if it be construed as applicable to or undertaking to authorize a municipality to impose a charge upon Southern Bell Telephone and Telegraph Company for the continued and future use of municipal streets.

"4. All costs in this cause having been paid or provided for, no provision therefor is made in this order.

"ORDERED and ADJUDGED this 14th day of Sept., 1957."

> may be differences of opinion as to the inferences to be drawn therefrom. The stipulated facts consist largely of a history of the telephone companies within the State of Mississippi from the establishment in this state to date, insofar as such history is now available."

and setting out the history in its brief, appellant, discussing under seven numbered points, each extensively argued, the claimed errors of the district judge and assailing his opinion and order as without support in fact and in law, thus concludes its lengthy and detailed brief:

> "We submit that the history of the enactment of Chapter 38 of the Mississippi Laws of 1886 definitely rules out any idea that the legislature of Mississippi intended by that chapter to offer the grant of an irrevocable, perpetual franchise to telephone companies taking advantage of the act. We submit further that this history shows without any equivocation that the purpose of that act was simply to reenact legislation giving telegraph companies the right of eminent domain. That in the course of the passage of that act through the legislature telephone companies were included in the act so that they also would have the right of eminent domain. The fact that the appellee has been unable to present one shred of evidence to show that any claim was ever made to such a statewide franchise prior to 1929—although there were two litigated cases involving such rights—indicates clearly that appellee's predecessors in title did not interpret this law as giving them such a statewide franchise. We

submit further that, if such a franchise were intended, their right to claim such a franchise, has now been lost by the actions of appellee's predecessors in title. The facts in this case distinguish it from all of the reported cases holding that particular legislation was the offer of an irrevocable perpetual franchise.

"The effect of the decision of the learned district judge is not limited to the City of Meridian. It involves the birthright of all citizens of the State of Mississippi and of untold future generations. We earnestly urge the court to study carefully the history of this legislation and the actions of the parties thereunder. We sincerely believe that if that is done, the court will arrive at the same conclusion to which we have arrived—that no such irrevocable, perpetual franchise ever existed, and that, even if it did, it has been long ago lost by the actions of appellee's predecessors in title. Therefore, the judgment of the district court should be reversed, the complaint of appellee dismissed with prejudice and judgment awarded appellant on its counter claim."

Appellee, on its part, agreeing with appellant that there is no issue of fact in this case, and stating:

"Before taking up our particular reply to appellant's brief, we believe that it will clarify the issue for us to present the contentions which were submitted to and sustained by the court below."

puts forward as a basis for them, Point One of its own:

"The Mississippi Act of 1886, contained an offer which, when accepted by the plaintiff, resulted in a contract between the State and the plaintiff which cannot be impaired by subsequent legislation."

In general support of this point and of its contention that the opinion and decision of the district judge were correct and should be affirmed, appellee thus states and argues its position:

"It is our position that the offer contained in the act of 1886 was accepted by the plaintiff's predecessors, and that when that offer was accepted it resulted in a contract which cannot be impaired by the imposition of additional burdens such as the exaction of compensation.

"It is admitted in the answer and stipulated in the record that both the Great Southern Telephone and Telegraph Company and the Cumberland Telephone and Telegraph Company were operating in the State of Mississippi prior to 1886, and during each and every year since 1886, those two companies and Southern Bell have continued to construct, maintain, operate and expand and extend their plant and facilities throughout the state.

"The following propositions of law, which were sustained by the lower court, have been firmly established by judicial decisions of the United States Supreme Court, other federal courts, and state courts:

"(1) The Legislature of Mississippi in 1886 had plenary control over all highways and streets of

the state, whether within or without municipalities, and the Act of 1886 was an offer to telephone and telegraph companies of the right to make use of all such highways and streets for the purpose of providing the citizens of this state with telephone service. This right was granted without any requirement of paying compensation to either municipalities or the state. The companies were already operating in the state, obviously on a small scale—the industry was in its infancy—the legislature wanted the industry to expand—note the title to the Act, page 8, supra.

"(2) That the continued maintenance of poles and lines and other facilities after 1886, as well as the continued construction, expansion, and extension of such lines on the public streets of Meridian and other streets and highways throughout the State of Mississippi constituted an acceptance by the telephone company and its predecessors of the offer of the right to use all streets and highways which was contained in the 1886 Act.

"(3) That these acts of acceptance resulted in the creation of a perpetual and irrevocable contract between the Telephone Company, on the one hand, and the State of Mississippi, on the other, which contract right is protected from impairment by the provisions contained in both the Federal and State Constitutions prohibiting the impairment of the obligation of contracts.

"(4) The imposition upon appellee of an obligation to pay two percent of its monthly service charg-

es as compensation for the use of the streets of Meridian constitutes an unlawful attempt to violate the obligations of a contract which was created and has been in existence for more than seventy years, and is therefore violative of the constitutional prohibitions. It would place an additional burden on the vested rights of the plaintiff.

"The various arguments advanced by appellant in its brief were argued at great length to the district court. The court, after giving consideration to all these contentions, and after reviewing the circumstances and conditions which existed at the time of the passage of the 1886 Act, concluded that the Act extended an invitation in a contract which is protected not only by the Federal Constitution but by the State Constitution of Mississippi as well."

Upon a careful examination of the briefs and arguments in the light of the record made below, we find that they present nothing for our consideration that was not presented to, and considered by, the district judge, with whose judgment and with the reasons given for it in his thoughtful and thorough opinion, we find ourselves in full agreement. We conclude, therefore, that no useful purpose would be served by our rediscussing at length all the contentions of the parties and redeclaring as to them the views declared by him. In addition to announcing our general agreement with the opinion and the result, it will, we think, be sufficient for us to write briefly on one or two of the contentions made and strongly relied on by appellant as to which we think something in addition may well be said.

Of these contentions, the one most strongly urged by appellant is that, since in the Hodges opinion, 18 So. at page 84, the court stated of the Act of 1886:

> "It is a permissive statute. What it grants is a mere license revocable by the state. 148 U. S. 102."

this constitutes a binding decision against the conclusion of the district judge that the statute constituted, beyond the power of the state to impair, an offer which, when accepted, became a binding contract. In our view this contention is without merit because, considered in itself, the language above quoted is dicta, stated merely arguendo and as a make weight and not in decision of any point at issue in the case. More important, however, if the statement could be considered decisional, that in short, though the issue was not raised in the case the court was intending to and did decide that rights conferred by the statute of 1886 upon those accepting under it could be taken away or impaired by subsequent legislation, appellant can take no comfort from such a decision. For, under the federal decisions cited and relied on by the court below, the offer of the statute when accepted became a contract beyond the reach of state impairment by either legislative or judicial action, and any decision of the Mississippi Supreme Court must yield to the decisions of the Supreme Court of the United States to the contrary. Though, as clearly pointed out in the brief of appellee, a different Mississippi statute and a different Mississippi constitution are involved in *Willmutt Gas & Oil Co. v Covington County*, 71 So(2) 184, and there are other reasons for distinguishing the decision in that case, the same general considerations which deprive the Hodges case of authority here deprive that case of

authority. There the court held that, while the county could not prevent the use of the 16th Section lands there involved, it could under the particular language of the act, construed in the light of the Mississippi Constitution of 1890, make a charge for such use. While there was a dissent in the case as to the proper construction of the act, no constitutional question, no claim of impairment of a contract was raised, either by the parties or by the court.

Another matter of which brief notice may be taken is the complete inapplicability to the point presented and decided here, whether a later state act can impair the obligation of a contract entered into with the state, of the opinion of the Sixth Circuit in *Memphis v. Postal Telegraph & Cable Co.*, 145 Fed 602. What and all that was held in that case was that the State of Tennessee, which by an earlier statute had expressly granted to the City of Memphis the right to charge a rental for the use of its streets, had not by the enactment of a later general statute granting telephone and telegraph companies the right to use the streets, impliedly repealed the right so granted. In it the court merely held that the later statute was not intended to and did not repeal the earlier one on the facts of this case. No question of that kind is or could be presented here. There the utility was endeavoring to have the earlier statute declared repealed by the later, while here all that the utility is seeking is to have the later statute, as it was in the Memphis case, held to have been enacted with due regard and subject to the earlier one. What is said arguendo in the final paragraph of the opinion as a whole and, so read, is entirely consistent with this view.

Other specific contentions and arguments of appellant,

no better founded than these, could be pointed to. It will suffice, however, we think, to say that, confining our opinion, as the district judge did below, to the sole question presented in this case, whether the Mississippi Act of 1956, in attempting to authorize the City of Meridian to exact compensation by imposing a rental charge for the use of the streets for the poles, wires and other equipment of the plaintiff was invalid as impairing the obligation of a contract and may not therefore be enforced against the appellee, we approve his opinion and judgment. Nothing in the opinion below dealt with, nothing in what we do here in affirming it undertakes to deal with or decide, any question beyond the specific question here presented. Particularly is it not intended to deal in any way here with questions relating to the exercise of the taxing and police powers of the state or city.

As thus specifically limited, the opinion of the district judge is approved and his judgment is AFFIRMED.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI,
EASTERN DIVISION

SOUTHERN BELL TELEPHONE AND
TELEGRAPH COMPANY,
PLAINTIFF

VS. NO. 812

CITY OF MERIDIAN, MISSISSIPPI
DEFENDANT

OPINION OF THE COURT
(Filed Sept. 6, 1957)

This is an action for declaratory judgment brought by the Southern Bell Telephone & Telegraph Company against the City of Meridian, Mississippi. The principle question for solution is whether or not an irrevocable franchise was granted to the predecessors of Southern Bell Telephone & Telegraph Company by an act of the legislature of the State of Mississippi in 1886, and whether or not the telephone company accepted that grant so as to constitute a contract protected by the Federal Constitution.

The question stems and arises by virtue of the passage of an act of the Legislature of Mississippi in 1956, under which statute the City of Meridian contends it is authorized to charge the telephone company two per cent of the company's monthly service charges as compensation for use of the streets, alleys and public places situated in the City.

The plaintiff contends that it holds a perpetual and irrevocable grant from the State of Mississippi to the use and occupancy of all the highways, streets and roads in

Mississippi, including municipal streets, without paying compensation therefor, and that this right was granted to the company and its predecessors by the act of the Legislature of 1886. The plaintiff further contends that the act of 1956, Section 5 (e) thereof, does not authorize the charge claimed by the City.

The City contends that no perpetual grant was given by the act of 1886, but that it was only a license and subject to be extinguished by an act of the legislature at any time it desired. It further contends that even if the law of 1886 was an irrevocable grant, then the defendant has rescinded and abandoned the grant by the action of the plaintiff's predecessors in title by entering into new contracts with the defendant and other municipalities in the State of Mississippi inconsistent with the alleged agreement made under the Laws of 1886; and further by the acceptance of benefits and advantages under the Mississippi Constitution of 1890 by the plaintiff and its predecessors in title and thereby agreeing by virtue of Section 179 of the Mississippi Constitution of 1890 to the relinquishment of all contractual rights held by the plaintiff and its predecessors in title contrary to the said constitution of 1890. It further contends that plaintiff's predecessors in title had abandoned all rights acquired under the act of 1886 and that as a matter of fact the City had reacquired all of the alleged rights by prescription or adverse possession and that the plaintiff had lost the alleged rights by reason of estoppel and laches.

Briefly, those are the contentions of the respective parties.

In determining the intent of the legislature by its act of 1886 it is necessary to consider the act as of the time when it was passed. Prior to 1886 the State of Mississippi had

conferred upon telegraph companies the right to erect their posts and fixtures upon the highways and streets of the State, but telephone companies by the prior acts were not mentioned. See Section 1065, 1066 and 1067 of the Miss. Code of 1880. In 1886 the legislature adopted Chapter 38, granting to telegraph and telephone companies the right to use the streets and highways for the purpose of broadening the communications system, and by the title of the act it is shown it was passed for the purpose of encouraging and facilitating the construction of telephone and other like lines in the State. The pertinent part of the act is as follows:

> "AN ACT to encourage and facilitate the construction of Telegraph, Telephone and other like lines in the State of Mississippi.
>
> SECTION 1. Be it enacted by the Legislature of the State of Mississippi, that any telegraph or telephone company, chartered or incorporated by the laws of this or any other State of the United States, shall, upon making due compensation, as hereinafter provided, have the right to construct, maintain and operate telegraph or telephone lines through any public lands of this State, and on, across and along all highways, streets and roads, and across and under any navigable waters, and on, along upon the right of way and structures of any railroad, and, in case of necessity, on, under, or over any private lands in this State; provided, that the posts, arms, insulators and other fixtures of such telegraph or telephone lines be so erected, placed and maintained as not to obstruct or interfere with

the ordinary use of such highways, railroad, streets or water, or with the convenience of any land owner, more than may be unavoidable."

The pertinent parts of Chapter 372, Laws of 1956, are as follows:

"In addition to such other rights as it may have to use the streets, alleys and public places of a municipality, a public utility which holds a certificate of public convenience and necessity granted under the provisions of this act covering the geographical area of such municipality, and which (1) is operating under a municipal franchise on the effective date of this act, or (2) shall have previously operated under such a municipal franchise which has expired within five (5) years prior to the effective date of this act, or (3) which shall hereafter operate under a municipal franchise hereafter granted, may, after the expiration of any such franchise continue to use the streets, alleys and public places therein situated upon condition that (1) such utility shall pay the said municipality compensation therefor at the rate of two per cent (2%) of said utility's gross revenues from sales to residential and commercial customers within said municipality, in case of a utility defined in Section 1 D (1) and 1 D (2) and in the case of a utility defined in 1 D (3) the said utility shall pay two per cent (2%) of the monthly service charges in said municipality whether said utility has a franchise to operate therein or not, such payments to be made quarterly of each year after the effective date of this act, and

(2) that after the expiration of such franchise the municipality, or any customer of such utility in such municipality, upon appropriate petition, shall be entitled to a hearing as to whether or not the certificate of convenience and necessity may then and thereafter be granted on a permanent basis as herein set out. Any co-operative which shall operate within any area of a municipality shall likewise pay such municipality two per cent (2%) of the co-operative's gross revenue from sales to residential and commercial customers within said municipality. Any municipality shall have the right to acquire by purchase, negotiation or condemnation the facilities of any utility that is now or may hereafter be located within the corporate limits of such municipality."

Another pertinent part of the Laws of 1956, being Section 39 of Chapter 372, is as follows:

"Repeal of conflicting acts. —Any acts, or parts of acts, in conflict with the provisions of this act are hereby repealed, but neither the repeal of any such acts nor the passage of this act shall affect any act done, or any cause of action, whether in litigation or otherwise, or any rights accruing, accrued or established prior to the effective date of this act."

The is no controversy about the facts in this case. All the facts are stipulated or shown by documentary evidence in the record from which inferences may be drawn. Prior to 1850 the telegraph came into public use and shortly thereafter the Legislature of Mississippi enacted a statute au-

thorizing telegraph companies to construct their lines and to set up and erect poles and fixtures along the public highways and streets of the State of Mississippi, as well as through public lands belonging to the State. (See Miss. Code 1857, p. 300) Following the invention of the telephone in 1876 several companies entered Mississippi and began operation of a telephone business. Prior to August 4, 1883, the Louisiana Telephone Company maintained telephone exchanges and used the streets, alleys and public places in certain municipalities, including the City of Meridian. On August 4, 1883, the Louisiana Telephone Company conveyed to the Great Southern Telephone and Telegraph Company all of its properties and rights. Subsequent to this purchase and during each year subsequent to the enactment of Chapter 38 of the Mississippi Laws of 1886, and up until the year 1898, when it was consolidated with the Cumberland Telephone and Telegraph Company, the Great Southern Telephone and Telegraph Company operated under this statute and used the streets and roads in the State to promote its business. The Cumberland Telephone and Telegraph Company had started to do business in Mississippi prior to the year 1886, and after the passage of the Laws of 1886 and during the subsequent years until 1926, the Cumberland Telephone and Telegraph Company continued to expand its business and to use the highways and streets in the State. On June 30, 1926, the Southern Bell Telephone & Telegraph Company purchased the Cumberland Telephone and Telegraph Company and succeeded to all the rights and property of the Cumberland Telephone and Telegraph Company of every kind. Since the acquisition by the Southern Bell Telephone and Telegraph Company it has continued to expand its business and to use the streets and highways in the State of Mississippi, and it therefore

appears that the plaintiff and its predecessors in title have continuously used the roads and public streets in the State of Mississippi from 1884 up until the present time and up until the time of passage on March 29, 1956 of the act of the legislature under which the City of Meridian now contends it is entitled to charge the two per cent of plaintiff's monthly service charges.

As hereinbefore stated, some of the telephone companies had begun to do business in the State and the City of Meridian was one wherein it was doing business, and the City of Meridian had given the telephone companies the right to use the highways and streets free of charge, as had also the cities of Jackson and Vicksburg; but the City of Jackson had granted such right upon the consideration that the telephone company would furnish them one telephone free of charge. Since that time the City of Meridian has granted franchises to the telephone companies and the telephone companies have furnished a small number of telephones to the City free of any charge whatsoever.

One of the early decisions of the Supreme Court of Mississippi applicable to the issues in this case is that of Hodges vs. Western Union Telegraph Company, 72 Miss. 910, 18 So. 84. In that case the City had passed an ordinance requiring all the telegraph companies doing business in the city to pay as rent for the use of the streets $2.50 per year for each telegraph pole erected on any of the streets. The company declined to pay the rent and suit was filed to collect the rental charge. The Supreme Court of Mississippi held that under the act of 1886 the Western Union had the right to occupy the streets of the city without compensation and that all the power which the city had over its streets

was derived from the legislature, whose power over the streets of the city was supreme and transcendent, and that the Act of 1886 required no compensation to be paid by the company for the use of the streets. The court further held in that case that the legislature, not having authorized the City of Meridian to exact a rental charge, that its effort so to do was beyond its power. It further held that the act was a license to the company to use the streets, but was revocable at the will of the legislature.

The question now arises whether or not the plaintiff in this case and its predecessors in title had accepted the privileges granted by the Laws of 1886 so as to constitute a contract between the State and the companies that is protected by the federal and state constitutions. The authorities are unanimous that it is a binding contract and to change its terms would be to impair the obligations of a contract and conflict with the U. S. Constitution. Certainly if the act had been repealed before it was accepted by any company, then no company coming into the State subsequent to the repeal could claim its benefits; but the plaintiff in this case, having accepted the benefits and relied upon its provisions and expanded its services, indicated a clear intent to accept the offer, and as a result a binding contract became effective. This question has been before the Supreme Court of the United States, as well as many of the states, and all the courts hold that where there has been an offer and an acceptance by conduct, then a binding contract is created and the offer to the state to companies of benefits when accepted by any utility is irrevocable and is more than mere license to use the streets at the will of the legislature. Many authorities are cited by plaintiff upholding this doctrine and no one squarely in point is cited

by opposing counsel, but counsel for the City do cite many authorities upon a different state of facts. I shall not undertake to cite all the applicable authorities but only those that are clearly decisive.

The Supreme Court of the United States in Russell vs. Sebastian, 233 U. S. 195, that under an act of California offering the use of the streets to a gas company and accepted by the gas company by the use thereof, created a contract and that to change its terms would be to impair the obligagations of the contract. In that case there was a grant to utilities contained in the California constitution of 1879. The gas company entered the city in 1909 and laid its pipes in certain streets of the city. In 1911 the California constitution was amended and the city contended that the 1911 amendment to the state constitution took away the grant contained in the constitution of 1879. When the Gas company continued to use the streets and to expand into new streets the city undertook to adopt an ordinance prohibiting the laying of pipes without a grant from the city and unless the utility company bought and paid for a municipal franchise. The city in that case further contended that the grant of the state, if it had been a contract, should not extend to any streets other than those that were being occupied prior to 1911. The California Supreme Court upheld the contention of the city, but the Supreme Court of the United States rejected the city's contention and held that the offer of the state when accepted by the utility ripened into a contract which was protected under the constitution. In that case the court said: "That the grant, resulting from an acceptance of the state's offer, constituted a contract, and vested in the accepting individual or corporation a property right, protected by the Federal Constitution, is not op-

en to dispute in view of the repeated decisions of this court."

The court further said:

"The controversy in the present case relates to the extent to which the grant had become effective through acceptance. It is not contended that the change in the constitution could disturb the company's rights in the streets used previous to the amendment; but it is insisted that such actual user measured the range of the acceptance of the grant, and hence defined the limits of its operation***."

"***Such a grant would not be one of several distinct and separate franchises. When accepted and acted upon it would become binding—not foot by foot, as pipes were laid, but as an entirety, in accordance with its purpose and express language." See also Grand Trunk Western R. Co. vs. South Bend, 227 U. S. 544; also a later California case, Pacific Telephone and Telegraph Company vs. City of Los Angeles, 282 Pacific 2d, 36; Owensboro vs. Cumberland Telephone and Telegraph Company, 230 U. S. 58, in which case the court said: "That an ordinance granting the right to place and maintain upon the streets of a city poles and wires of such company is the granting of a property right has been too many times decided by this court to need more than a reference to some of the later cases***

"The grant by ordinance to an incorporated telephone company, its successors and assigns, of the right to occupy the streets and alleys of a city with its poles and wires for the necessary conduct of a public telephone business, is a grant of a property right in perpetuity, unless limited in duration by the grant itself, or as a consequence of some

limitation imposed by the general law of the state, or by the corporate powers of the city making the grant." See also City of Louisville vs. Cumberland Telephone & Telegraph Company, 224, U. S., 649.

In 1953 the Attorney General of the State of Mississippi was requested to give an opinion as to whether in granting a franchise to the Southern Bell Telephone & Telegraph Company a municipality may exact from the company as the consideration for the franchise the certain percentage of the company's gross income. The Attorney General's opinion shows that he gave an extensive investigation into the question and answered that in view of the Laws of 1886 he was of the opinion that there was a contract created by the act of 1886 and the acceptance of the use of the streets by the telephone companies, and that, therefore, to exact compensation would be in violation of the Federal Constitution. This opinion, of course, is not binding upon the courts, but is a persuasive authority. See also Southern Bell Telephone and Telegraph Company vs. City of Mobile, 162 Federal 523; 174 Federal 1020 (Fifth Circuit Court of Appeals case.)

Under the stipulation and documents offered in evidence it is clear that the act of 1956 by the Mississippi State Legislature, if it undertakes to authorize a municipality to impose the charges, is beyond the power of the legislature and would conflict with the constitution of the United States.

The City contends, however, that even though there was created a contract that by the subsequent conduct of the plaintiff and its predecessors it has abandoned that contract and estopped itself to claim any rights under the

contract by its subsequent conduct; that by entering into a new contract with the defendant and by taking advantage of laws passed under the Mississippi Constitution of 1890 it relinquished any rights that it had under the act of 1886, and that the City had extinguished the grant by prescription or adverse possession and that the plaintiff was guilty of such laches that it could not now take advantage of the act of 1886. One of the acts that the City relies upon is that on April 7, 1898, it appeared before the Mayor and Board of Aldermen of the City of Meridian and sought a franchise from the City to use the streets in the operation of its telephone business, and that in 1898 the City of Meridian filed a suit against the Cumberland Telephone Company in which it sought an injunction against the company to prevent it from using the streets without a franchise from the City. This case was removed to the Federal Court of the Southern District of Mississippi, but the record has now been lost and the only thing shown is the judgment of the Federal Court wherein the lawsuit was dismissed at the cost of the City. After dismissal of the lawsuit in the Federal Court the attorney for the telephone company appeared before the Board of Aldermen on June 9, 1899, seeking a franchise for the said company in order that the company might establish their plant and do business in Meridian. Subsequently a franchise was granted and in granting that franchise the company agreed to furnish to the City free of charge some few telephones. Also relied upon by the City is the conduct of the company in taking advantage of a general law of the State by which telephone companies were given the right of eminent domain over private property. With reference to the franchises, the record shows that on May 6, 1884, the governing authorities of the City of Meridian authorized a predecessor of plaintiff to operate telephone

lines in the City of Meridian and to use its streets and other public places for such service, and that by March 16, 1886, the date of the passage of the act, one of plaintiff's predecessors in title had established a telephone exchange in the City of Meridian and was operating forty-four telephones in the homes and offices in the City. And, likewise, prior to March 16, 1886, the Cumberland Company, another of plaintiff's predecessors, had commenced operations in the State of Mississippi, and that between March 16, 1886, and March 8, 1898, two of plaintiff's predecessors had secured franchises in seven cities in Mississippi and had accepted the franchises and had agreed to furnish free telephone service to the cities.

The fact that prior to 1886 franchises had been granted by the cities, and even though consideration might have been paid therefor, is immaterial for the reason that under the Hodges case, cited supra, the State Legislature had complete control over all of the streets and highways of the State, and, therefore, when the act of 1886 was passed it took away from the cities the power to make any charge for the use of the streets by telephone companies. The company is not estopped by the act of its predecessors or either by entering into new franchises for the reason that there was already existing an irrevocable contract between the State and the plaintiff and its predecessors granting to the plaintiff the right to use the streets. This right could not be altered. The furnishing of a few telephones free of charge to the City would be insufficient on which to base a judgment that the telephone company, and its predecessors, had abandoned any such valuable right as it had under the grant. There is no inconsistency in operating under the grant that is given to it by the State and any grant that it might

receive from the municipality. Traverse City vs. Consumers Power Company, 64 N. W. 2d, 894; Northwestern Telephone Exchange vs. City of Minneapolis, 83 N. W. 527; and in the later opinion in 86 N. W. 69; City of Los Angeles vs. Los Angeles Water Company, 177 U. S. 558; City of Minneapolis vs. Minneapolis Street Railway Co. 215 U. S. 417, wherein the Supreme Court of the United States said, "Acquiescence in a regulation which may not have been deemed injurious and may have been deemed wise and expedient does not preclude a contest against the enforcement of regulations which are injurious and violative of contract rights."

The contention that the plaintiff is estopped by accepting benefits under the constitution of Section 179 of 1890 cannot be upheld. When the constitution was adopted in 1890 the plaintiff had acquired vested rights and these vested rights could not be impaired by the State of Mississippi either by legislation or by the adoption of a constitution undertaking to do so. Russell vs. Sebastian, 233 U. S. 195, and other authorities hereinbefore cited. In 1890 plaintiff's predecessors were already doing business in the State and had acquired vested property rights that were irrevocable, and nothing but a clear intent to abandon those property rights or to relinquish them could deprive plaintiff or its predecessors of those rights. Plaintiff and its predecessors had a perfect right to take advantage of any general laws that were passed for the benefit of it or any other corporations engaged in business in the State, and the fact that it does do so cannot deprive it of a vested right. As a matter of fact, the history of Sections 178 and 179 as gleaned from the decisions of the Supreme Court of Mississippi indicate very clearly that Sections 179 was not intended to apply to foreign corporations, but was applicable only to the

corporation created under the laws of the State of Mississippi. It is clear, however, under the authorities that if it was intended to apply to foreign corporations, then it could not be applicable to the plaintiff and its predecessors because of their rights having become vested prior to 1890. An intent to relinquish a vested right must be very clear, and certainly there is nothing in this record that shows any intent on the part of the plaintiff or its predecessors to relinquish any right it had therefore acquired. The doctrine of laches, estoppel or adverse possession is not applicable to the facts disclosed by the record in this case. The plaintiff nor any of its predecessors has been guilty of any conduct that would estop it from asserting the rights it now claims. It is guilty of no laches for the reason that the record shows clearly that from 1886 up until the present date it has continuously and uninterruptedly used the streets and highways of the State under the grant given by the act of 1886, and up until the passage of the act of the Legislature of 1956 its right to use the streets of the cities and the highways of the State has not been challenged successfully in any proceeding whatsoever.

I am of the opinion that the City is without power to impose the charge it seeks to impose upon the plaintiff in this case and that a declaratory judgment should be entered denying the City of Meridian the right to impose the charge.

An order may be drawn accordingly.

CHAPTER 38 OF THE MISSISSIPPI LAWS OF 1886 READS IN FULL AS FOLLOWS:

AN ACT to encourage and facilitate the construction of Telegraph, Telephone and other like lines in the State of Mississippi.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi*, That any telegraph or telephone company, chartered or incorporated by the laws of this or any other State of the United States, shall, upon making due compensation, as hereinafter provided, have the right to construct, maintain and operate telegraph or telephone lines through any public lands of this State, and on, across and along all highways, streets and roads, and across and under any navigable waters, and on, along upon the right of way and structures of any railroad, and, in case of necessity, on, under, or over any private lands in this State; provided, that the posts, arms, insulators and other fixtures of such telegraph or telephone lines be so erected, placed and maintained as not to obstruct or interfere with the ordinary use of such highways, railroads, streets or water, or with the convenience of any land owner, more than may be unavoidable.

Right to contract over private lines, etc.

Over private lands, etc.

SEC. 2. *Be it further enacted*, That whenever any such telegraph or telephone company desires to construct its lines on, along or

upon the right of way and structures of any railroad, or upon and along the roadway of any incorporated turn-pike, or in case it should be necessary to construct the same under, on, or over any private land in this State, the said telegraph or telephone company shall, by its agents, have the right peaceably to enter upon and survey, locate and lay out its said lines thereon, and may contract with the owner or owners of any such railroad for the use of its right of way and structures, or with any turnpike company for the use of its right of way, for telegraph or telephone purposes, and may agree and contract with the owner of any land for an easement therein, for the purpose of constructing, maintaining and operating its lines, as herein provided; and in case said lands belonging to the estate of any deceased person, then said company may agree and contract with the executor or administrators thereof, and if the same belongs to a person *non compos mentis* or a minor, then with the guardian, or in case said land be held by trustees of school sections, or any other trustees, then with such trustees, said executors, administrators, guardians and trustees being hereby declared competent to make such contracts, which shall be binding upon all parties in interest; and said executors, administrators and guardians shall be liable on their respective bonds, to those interested for any money received by them un-

May contract with owners for easement.

With whom to negotiate.

der said contracts or agreements; and, if the parties and such company prefer the question of such compensation shall be referred to arbitrators, mutually chosen, whose award, or in case of disagreement, that of the umpire shall be binding between the parties.

Arbitrators may be chosen.

SEC. 3. *Be it further enacted*, That in case any telegraph or telephone company having the rights and privileges, herein granted, for any cause, shall not agree with the owner or owners of any land, or with the executor, administrator, guardian or trustees of the estate to which the same belongs, or with the owners, lessees or managers of any railroad or incorporated turnpikes, on or in which an easement, right or privilege is sought, such telegraph or telephone company may file its petition in the office of the clerk of the Circuit Court in the county in which said land is located, or in case of a railroad or turnpike, then in the office of the Circuit Clerk of any county in which any portion of the said railroad or turnpike may be located, or through which the same may run. Said petition shall designate the land or railroad and structures or turnpikes as the case may be, and particular use, right, easement or privilege sought to be condemned. It shall also give the name of the petitioner, and shall give the place of residence, if the same be known, of the name or names of the reputed owner or owners of said property, or of the executor, administra-

In case shall not agree.

May file petition.

Petition to designate land, etc.

Signed and sworn to.

tor, guardian or trustees, and if the name and places of residence of such persons be not known to the petitioner, the petition shall so state; such petition shall be signed and sworn to by an officer, agent or attorney of the telegraph or telephone company.

SEC. 4. *Be it further enacted*, That such petition as herein before provided for may be filed at any time, and the proceedings thereunder had shall be *in rem* against such parcel or parcels of land, or against such railroad and structures or turnpike roadway, such petition and proceedings in case the lands of private owners are proceeded against, shall only embrace or include in any one proceeding the lands of one proprietor or owner, in case any right, privilege or easement is claimed or demanded in or along any railroad right of way and structures or in or along any turnpike, then the property of but one such railroad or turnpike can be embraced in one petition.

May be filed at an ytime.

SEC. 5. *Be it further enacted*, That it shall be the duty of the Clerk, upon the filing of such petition, to cause a notice in general terms thereof, and of the time appointed for the inquest, to be served upon the owner or owners of said lands, guardians, executors or administrators or trustees, as hereinfore provided, to be left at his or her, or their place, or places of residence, at least five days be-

Clerk to give notice.

fore such assessment, if such parties named in said petition reside in the county; and in case of a railroad or turnpike, the notice may be served upon any agent upon whom notice of any legal proceedings is hereby authorized to be served; if any such owner, or their places of residence are not known or stated in the petition, or if such owners or any of them reside out of the county, such notice shall be published by three consecutive weekly insertions in any newspaper published in the county in which such petition is filed, and if none be published in the county, then in some newspaper published in one of the cities or towns of Mississippi which shall be nearest said property, and a copy of such notice shall be mailed to such interested party by the said Clerk.

Publication to be made.

SEC. 6. *Be it further enacted,* That upon the filing of any such petition, the Clerk shall forthwith issue a writ commanding the Sheriff to summon and to have in the office of said Clerk, or on or near said land, railroad or turnpike, at the time in the writ to be mentioned, and within ten days, in case the proceeding is against a railroad or turnpike company, or if the owners all reside in the county, and are known, or, if not, then within thirty days, nine good and lawful men, citizens of the county, from whom, and talismen, if need be, five Commissioners shall be cho-

Writ to be issued.

Five commissioners.

sen, who shall be sworn by the Sheriff, or his deputy, to well inquire and true assessment make, of the due compensation for the cash value and actual damage which the owner or owners of said land, railroad or turnpike company respectively, shall be entitled to have for the appropriation thereof, to the use of the petitioner, as prayed for, and a majority of said Commissioners, may render said award; the said Commissioners may hear testimony of witnesses offered by either party, who shall be sworn by the Clerk, as to the cash value of the land sought to be appropriated by the petitioner, and the injury then necessarily known to result to such owner, railroad or turnpike company, as the necessary and immediate consequence of the appropriation sought to be made by the petitioner, without reference to uncertain or remote benefits or disadvantages that may or may not occur in the future; the Clerk shall take down the testimony in writing, and the Sheriff or his deputy shall preserve order.

To hear testimony.

Testimony in writing.

SEC. 7. *Be it further enacted,* That the said Commissioners may, if they so desire, inspect the road, structure or land on which an assessment or privilege is sought, and the owners of any land, railroad or turnpike may intervene for their respective interests in the premises, and may have the writ of subpoena issued by the Clerk and executed by the

Commissioners may inspect land.

Sheriff, for any witnesses, but no evidence shall be received in respect to the title or ownership of the property, nor upon any question other than that of the cash value of lands sought to be appropriated by the telegraph or telephone company, and the injuries then necessarily known to result to such owner, railroad or turnpike company, as the necessary and immediate consequence of the appropriation sought.

May sit from day to day.

SEC. 8. *Be it further enacted*, That if said Commission shall fail to complete its inquiries and make an award the first day assembled, the Sheriff shall adjourn said Commission over from day to day, until the same is completed, and, in the event any of said Commissioners shall, after having been sworn, and before the rendition of the award, become unable from sickness or other cause, to continue on said Commission, he may be excused therefrom by the Sheriff, and another summoned in his place, who shall be sworn as the others were, and to whom shall be read the testimony of the witnesses who have before that testified in the case, and who shall act in lieu of the Commissioner so excused.

Report of award to be delivered to sheriff.

SEC. 9. *Be it further enacted*, That the Commissioners, after making their award as hereinbefore provided, shall make and sign a report of their proceedings in the premises,

and shall deliver the same to the sheriff, who, for any informality, may have the same corrected by said Commissioners, and said sheriff shall make immediate return thereof, with the writ, and his actions thereon, to the said clerk; and, upon the actual payment in cash, or tender of the same, to the person or company, or the said clerk for the use of the same, entitled to receive the same of the whole amount of the award made as hereinbefore directed, the said petitioner or its assigns, shall have the full and perfect right to enter upon the property described in said petition, and to have, possess and enjoy the easements, rights and privileges the petition set forth and claimed; and a full record shall be kept in said clerk's office, of all proceedings had under this Act.

Record to be kept.

SEC. 10. *Be it further enacted*, That for good cause shown by the petitioner, or any owner, railroad or turnpike company, by motion to the judge of the circuit court district in which said proceedings were had, a new inquest and assessment may be had; *provided*, said motion shall state the grounds upon which said new inquest is asked, and be supported by the affidavit of the party applying therefor; that the award of the Commissioners was contrary to the law and the evidence, and shall have filed therewith a certified copy of all the proceedings had and done on the

For good cause new assessment may be had.

premises, including a copy of all the evidence, of the hearing of which motion the opposite party shall have at least five days' notice; and said motion must be made within ten days after the rendition of the award, as above provided for, and not after; and, if upon a consideration of the matter, the Judge shall be of the opinion that the Commissioners acted upon testimony that was irrelevent or incompetent, and that their award was contrary to the law, and such evidence as was competent and relevant, and that injustice has been done, a new inquest and assessment shall be ordered by him; and he shall order a new writ to issue and another inquest and assessment to be had, as on the first, at a day to be named by him, not less than five nor more than fifteen, after such order; *provided further*, that not more than one new inquest and assessment shall be allowed at the same matter; and, *provided further*, that from all orders of said Judge in reference to any proceedings under this Act, an appeal may be taken to the Supreme Court of this State within thirty days from the making of any such order or from the final order therein made, the appellant being required to give security for the cost of the appeal as in other cases; but no appeal shall hinder or delay a petitioner who has paid or tendered, to the party or parties, entitled under the award to receive the same, the amount of the award, from constructing and operating their lines on or over said prop-

Motion within ten days.

Only on new assessment allowed.

Appeal within thirty days

erty.

SEC. 11. *Be it further enacted,* That the Sheriff may act by his regular sworn deputy, or the coroner may act as in other cases provided by law; and for any default of the clerk, sheriff, coroner, commissioner, witnesses, or other persons, the penalty prescribed by law for like default in cases pending in the circuit court shall be enforced.

Who may act

SEC. 12. *Be it further enacted,* That the fees to be allowed in proceedings, under this Act, shall be as follows: To the clerk, for the filing of each petition, fifty cents; for the issue of each writ or notice, twenty-five cents; for each copy thereof, when executed, fifteen cents; for each subpoena, fifty cents; for filing the report of the commissioners and return of the sheriff, fifty cents; for filing any other paper or motion, ten cents; for issuing any other notice, twenty-five cents; for final record, advertising the same as allowed by law in other cases, and for taking down the testimony, he shall be allowed five dollars per day; to the sheriff, for serving notice each, fifty cents, summoning and organizing the Commissioners, three dollars; for presiding at the inquest and assessment for each day actually employed, three dollars; returning writ and report of Commissioners, one dollar, and to the commissioners, each three dollars per day, for each day actually employed.

Fees to be allowed different officers.

SEC. 13. *Be it further enacted,* That at the

Security for costs.

time of filing of said petition, such telegraph or telephone company may be required to give security for the cost of the proceedings.

SEC. 14. *Be it further enacted,* That all laws and parts of laws in conflict with this Act are hereby repealed, and that this Act take effect and be in force from and after its passage.

Approved, March 16, 1886.

CHAPTER 135 OF THE MISSISSIPPI LAWS OF 1876 READS AS FOLLOWS:

CHAPTER CXXXV.

AN ACT to facilitate the Construction of Telegraph Lines in the State of Mississippi.

SECTION 1. *Be it enacted by the Legislature of the State of Mississippi,* That any telegraph company, chartered or incorporated by the laws of this or any other State, shall, upon making just compensation as hereinafter provided, have the right to construct, maintain and operate telegraph lines through any public lands of this State, and on, across and along all highways, streets and roads, and across and under any navigable waters, and on, along, and upon the right of way and structures of any railroad, and in case of necessity on, upon, or over any private land in this State; *Provided,* That the posts, arms, insulators and other fixtures of such telegraph lines be erected, placed, used and preserved in the usual manner of constructing, operating, and maintaining telegraph lines on, or along, and upon the right of way and structures of railroads, and on, across and along highways, roads and streets, and across and under navigable waters, and in such manner as not to interfere with the ordinary use of the ordinary travel and traffic on such highways, railroads, streets, or waters, or with the convenience of any land owner, more than may be unavoidable; *Provided further,* That

Right to construct and operate.

any such telegraph company, for the purpose of making through lines, or connections, may acquire by lease or purchase, or by any other lawful contract, the right to use, own and operate, as a part of its lines, and according to the terms of its charter, any other line or lines of telegraph which are now or may hereafter be constructed, and the owners of such other telegraph lines are hereby empowered to make such contracts, and said company so acquiring said lines shall have and enjoy all the rights, franchises and privileges theretofore vested in the former owners.

Contracts with other lines.

SEC. 2. *Be it further enacted,* That whenever any such telegraph company desires to construct its lines on, along or upon the right of way and structures of any railroad, or upon and along the roadway of any incorporated turnpike, or in case it should be necessary to construct the same under, on, or over any private land in this State, the said telegraph company shall, by its agents, have the right to peaceably enter upon and survey, locate and lay out its said lines thereon, and may contract with the owner or owners of any such railroad for the use of its right of way and structures, or with any turnpike company, for the use in its roadway for telegraph purposes; or may agree and contract with the owner of any land for an easement therein, for the purpose of constructing, maintaining and operating its telegraph lines, as herein

Right of way, how obtained.

provided; and in case said lands belong to the estate of any deceased person, then said company may agree and contract with the executors or administrator thereof; and if the same belong to a minor, or person *non compos*, then with the guardian, or in case said land be held by trustees of school sections, or other trustees of estates, then with such trustees; said executors, administrators, guardians and trustees being hereby declared competent to make such contract, which shall be binding ~~upon all parties~~ in interest; and said executors, administrators, guardians and trustees shall be liable, on their respective bonds, to account to those interested for any money received by them under said contracts or agreements; and if the parties and such company prefer, the question of compensation may be referred to arbirators mutually chosen, whose award, or, in case of disagreement, that of the umpire, shall be binding between the parties.

SEC. 3. *Be it further enacted*, That in case any telegraph company having the rights and privileges herein granted, for any cause, shall not agree with the owner or owners of any land, or with the executor, administrator, guardian or trustees of the estate to which the same belongs, or with the owners of any railroad or incorporated turnpike, on or in which an easement, right or privilege is sought, such telegraph company may file its

In case of disagreement.

petition in the office of the clerk of the circuit court of the county in which said land is located; or in case of a railroad or turnpike, then in the office of the circuit clerk of any county in which any portion of the said railroad or turnpike may be located, or through which the same may run. Said petition shall designate the land or railroad, and structures or turnpike, as the case may be, and the particular use, right, easement or privilege sought to be condemned. It shall also give the name of the petitioner, and shall give the place of residence, if the same be known, of the name or names of the reputed owner or owners of said property, or of the executor, administrator, guardian or trustees; and if the names and places of residence of the owners be not known to petitioner, the petition shall so state. Such petition shall be signed and sworn to by an officer or agent of the company, duly authorized in the premises.

Petition and proceedings thereunder.

SEC. 4. *Be it further enacted,* That such petition as hereinbefore provided, may be filed at any time and the proceedings thereunder had shall be *in rem* against such parcel, or parcels of land, or against such railroad and structures or turnpike roadway, such petition and proceedings in case the lands of private owners are proceeded against, shall only embrace or include in any one proceeding, the lands of one proprietor or owner, in case any right or privilege is claimed in any railroad rights of way and struc-

tures, or in any turnpike then the property of but one such railroad or turnpike, can be embraced in one petition.

SEC. 5. *Be it further enacted*, That upon the filing of such petition, the clerk shall cause a monition or notice from him of the filing of the petition and of the purport thereof in general terms, and of the time of the inquest and assessment of compensation hereinafter provided, to be posted by the sheriff or some other authorized person in some conspicuous place upon such parcel or parcels of land, railroad or turnpike, ten days before the said inquest, and assessment shall be made, and upon proof of such posting, by the return of the sheriff or oath of the person appointed, the authority of the commissioners hereinafter provided for shall be complete to proceed in the premises.

Notice of Inquest and assessment.

SEC. 6. *Be it further enacted*, That it shall be the duty of the clerk, upon the filing of such petition, to cause a notice in general terms thereof and of the time appointed for the inquest, to be served upon the owner or owners of said lands, or to be left at his, her, or their place or places of residence, at least five days before such assessment, if such owners are named in the petition reside in the county; and in case of a railroad or turnpike, the notice may be served upon any agent upon whom like notice and legal process could

Duty of clerk as to notice.

be served in other legal proceedings. If any such owners or their places of residence are not known, or stated in the petition, or if such owners, or any of them, reside out of the county, such notice shall be published by three consecutive weekly insertions in some newspaper published in the county in which such petition is filed, and if none be published in the county, then in some newspaper of one of the cities or towns of Mississippi which shall be nearest the said property.

Publication of notice.

SEC. 7. *Be it further enacted*, That upon the filing of any such petition the clerk shall forthwith issue a writ, commanding the sheriff to summon and to have on or near said land, railroad or turnpike, at the time in the writ to be mentioned, and within fifteen days if the owners are all known and reside in the county, or if not, then within thirty days, nine good and lawful men, citizens of the county, from whom and talismen, if need be, five commissioners shall be chosen, who shall be sworn by and under the direction of the sheriff to well inquire and true assessment make of the damages and compensation which the owner or owners of said parcel or parcels of land, railroad or turnpike, respectively, shall be entitled to have for the appropriation thereof, to the use of the petitioner as prayed for; and a majority of said commissioners may render the award.

Selection of Commissioners

SEC. 8. *Be it further enacted,* That the said commissioners may, if they so desire, inspect the road structure or land on which an assessment or privilege is sought, and the owners of any land, railroad or turnpike may intervene for their respective interests in the premises, and evidence may be offered by the petitioner in intervenor showing how the said property will be injured or affected by the construction of said works, and they may have the writ of subpoena issued by the clerk or sheriff to compel the attendance of its or their witnesses; but no delay shall be caused by any, nor shall evidence be received in respect to the title and ownership of said property; and in case either party shall object to the proof or introduction of any particular matter as a basis of a claim for damage, then the commissioners shall report separately and specially as to such matter, and state the allowance for the alleged damage as a special item, and such item may be reviewed in the manner hereinafter pointed out.

Intervention of owners.

SEC. 9. *Be it further enacted,* That if, at the time appointed for the inquest. the proper preliminary proceedings have not been had in respect to some or all of the parcels of land or other property in the writ described, the petitioner may discontinue as to such parcels, in which said proceedings have not been had, or the commissioners may adjourn the proceedings as to them to another day, and pro-

ceed with respect to those parcels of land as to which the proper proceedings have been had; and any vacancy occurring in said body of commissioners on the day to which any adjournment shall be made, or at any other time, such vacancy shall be filled by the sheriff, and in case the commissioners cannot agree, or on the application of petitioner pending any adjournment, other commissioners may be chosen to make such assessment.

Vacancies of commisions.

SEC. 10. *Be it further enacted,* That the commissioners, after making their award as hereinbefore provided, shall make and sign a report of their proceedings in the premises, and shall deliver the same into the hands of the sheriff, who shall make immediate return thereof, with the writ, and his action in the premises and upon the actual payment in cash, to the person or company entitled to receive the same, of the whole amount of the award made as hereinbefore directed, the said petitioner, and its assigns, shall have the full and perfect right to enter upon the property described, and to have, possess and enjoy the easements, rights and privileges thereon, as the same are in the petition set forth and claimed, and a full record shall be kept in said clerk's office of all proceedings had under this Act.

Report by Commissioners.

Returned by Sheriff.

Right of petitioner to enter.

SEC. 11. *Be it further enacted,* That for good cause shown by the petitioner, or any

owner, by motion to the judge of the circuit court, in which said proceedings were had, a new inquest and assessment may be had; *Provided*, said motion shall state the grounds upon which said new assessment is asked, and shall be supported by the affidavit of the party applying therefor, of the hearing of which motion the other party shall have at least five days notice. If, upon a consideration of the matter, a new inquest and assessment shall be ordered by the judge in respect to any such property, a new writ shall issue and all proceedings be thereon had, as on the first assessment; *Provided further*, That not more than one new inquest shall be allowed at the instance of the same party in reference to the same matter.

New inquest.

SEC. 12. *Be it further enacted*, That in case of objection by the petitioner or any owner to any item of damage, as mentioned in the eighth section of this Act, such objector must, within ten days after the return of the sheriff's writ, give five days notice to the other party that, at a time and place mentioned, he or they will present said objection to the circuit judge, who shall thereupon proceed to pass upon the validity of such objection; and if said judge sustains said objection he shall strike the said item from the award, and the balance then found assessed, if any, shall be paid by the petitioner; and if said petitioner shall have paid more than said final

In case of objection to items of damage.

and amended award, the balance shall be refunded by the party to whom the same may have been paid. and it shall be unlawful for the clerk, pending any controversy, to pay over the sum in dispute to the owners of any of said property; *Provided*, that from all orders of the said judge in reference to any proceedings under this Act, an appeal may be taken to the supreme court of this State within sixty days from the making of any such order, or from the final order therein made; the appellant being required to give security for the costs of the appeal as in other cases, but no appeal shall hinder or delay a petitioner who has paid to the party or parties entitled under the award to receive the same, the amount of the award from constructing and operating their lines on or over said property.

Appeal may be taken.

SEC. 13. *Be it further enacted*, That the sheriff may act by a regular sworn deputy, or the coroner may act as in other cases provided by law, and for any default of the clerk, sheriff, coroner, commissioners, witnesses, or other person, the penalty prescribed by law for like default, in cases pending in the circuit court, shall be enforced.

Default by clerk, sheriff, etc.

SEC. 14. *Be it further enacted*, That the fees to be allowed in proceedings under this Act shall be as follows: To the clerk, for the filing of each petition, fifty cents; for the issue

of each monition, or notice, twenty-five cents; for each copy thereof, when executed, fifteen cents; for each writ to sheriffs, one dollar; issuing subpoenas, each fifteen cents, to be paid by party ordering the same; for filing the report of the commissioners and return of the sheriff, fifty cents; for filing any other paper or motion, ten cents; for issuing any other notice, twenty-five cents; for final record and advertising, same as allowed by law in other cases; to the sheriff, for posting monitions, each, seventy-five cents; serving notice, each, fifty cents; summoning and organizing the commissioners, three dollars; for presiding at the inquest and assessment for each day actually employed, three dollars; returning writ and report of commissioners, one dollar; issuing subpoenas, same as clerk; to the commissioners, three dollars for each day actually employed.

Fees.

SEC. 15. *Be it further enacted*, That at the time of the filing of its said petition, such telegraph company may be required to give security for the costs of the proceedings; and if said petitioner shall, before, or after the filing of said petition, tender to the owner of any parcel of land, railroad or turnpike as much or more money than the amount of the award, then such owner or owners shall be required to pay all costs occuring subsequently to said tender, and in case several parcels of land are included in one report, the amount

When owner required to pay costs.

taxed against said owner as his share of the costs, shall be (in) proportion to his share of the total amount of compensation awarded in the report.

SEC. 16. *Be it further enacted*, That any company assuming to have or enjoy any of the rights herein granted, shall, upon opening any office for business in this State, be required to pay a privilege tax, to be fixed by law, not to exceed one thousand dollars, and said company shall appoint an agent in each county through which its lines may be constructed, upon whom any process may be served in any suit brought against it in any of the courts of this State.

Privilege tax

SEC. 17. *Be it further enacted*, That all laws and parts of laws contravening the provisions of this Act are hereby repealed, and that this Act take effect and be in force from and after its passage.

APPROVED, April 5th, 1876.

THE MISSOURI ACT OF NOVEMBER 17, 1855, READS AS FOLLOWS:

CHAPTER CLVI.

TELEGRAPH COMPANIES.

AN ACT CONCERNING TELEGRAPH COMPANIES AND ELECTRIC TELEGRAPHING

§ 1. All telegraph companies to be governed by the provisions of this act.

§ 2. Lines may be constructed upon public highways, and across the waters of the State.

3. City and town authorities may direct construction of lines, where.

4. Proceedings where persons are aggrieved by using their land for telegraph lines.

5. Penalty for failing to transmit dispatches; proviso.

6. Liability for special damages, when.

7. Dispatches to be delivered by messenger, when.

8. To be sent by mail, when.

9. Railroad companies may become stockholders in telegraph companies or may construct telegraphs along their roads.

10. Process or notice, how served on telegraph company.

Be it enacted by the General Assembly of the State of Missouri, as follows:—

Telegraphic companies to be governed by the provisions of this act.

Section 1.—Every corporation, owner or association, engaged in telegraphing for the public, by electricity, in this State, shall be subject to the liabilities, and (be) governed by the provisions, contained in this act.

Lines may be constructed upon public highways, and across the waters of the State; proviso.

Sec. 2.—Any company incorporated for the purpose, may construct lines of electric telegraph upon and along any of the highways and public roads, and across any of the waters within the limits of this State, by the erection of the necessary fixtures, including

posts, piers or abutments, for sustaining the wires of such lines: *Provided*, The same shall be so constructed as not to incommode the public use of said highways or roads, or endanger or interrupt the navigation of said waters; nor shall this act be so construed as to authorize the erection of any bridge across any of the waters of this State.

Acts 1851, p. 286.

City and town authorities may fix the location, and direct ode of constructing telegraph lines, where.

Sec. 3.—The mayor and aldermen of any city, and the trustees of any incorporated town, through which the lines of such company are to pass, either by ordinance or by writing, may specify where the posts may be located, the kind of posts that may be used, the height at which, and the places where, the wires may be run; and such company, in erecting their line, shall be governed by the regulations therein prescribed. After the erection of said telegraph lines, the said mayor and aldermen, or trustees, shall have power to direct any alteration in the location or erection of said posts, piers or abutments, and, also, in the height at which the wires shall run, having first given such company, or their agents, opportunity to be heard on such alteration.

Ibid.

Proceedings where persons are aggrieved by using their land for telegraph lines.

Sec. 4.—If any person, over whose lands any telegraph line shall pass, upon which said posts, piers or abutments, shall be placed, shall consider himself aggrieved or damaged thereby, it shall be the duty of the county court within whose county such lands are,

on the application of such person, and on notice to the company, association or individual, owning such telegraph line, to appoint three discreet and disinterested persons as appraisers, who shall severally take an oath, before any person authorized to administer oaths, faithfully and impartially to perform the duties required of them by this act. And it shall be the duty of said appraisers, or a majority of them, to make a just and equitable appraisal of all the loss or damage sustained by said applicant, by reason of said lines, posts, piers or abutments; duplicates of which said appraisement shall be reduced to writing and signed by said appraisers or a majority of them; one copy shall be delivered to the applicant, and the other to the president or other officer of said association, or corporation, or owner of such telegraph, on demand; and, in case any damages shall be adjudged to said applicant, the association, or corporation, or telegrapn owner, shall pay the amount thereof, with costs of said appraisal, said costs to be liquidated and ascertained in said award. And said appraisers shall receive for their services, two dollars for each day they are actually engaged in making said appraisement.

Ibid.

Appraisal of damages, &c.

Sec. 5.—Every such association, corporation, company or owner, having a line of wires wholly or partly in this State, and engaged in telegraphing for the public, shall, during the usual office hours, receive dis-

Penalty for failing to transmit dispatches.

patches, whether from other telegraphic companies, or from individuals; and, on payment or tender of the usual charge, according to the regulations of such company, shall transmit the same, with impartiality and good faith, and in the order of time in which they are received, under penalty, in case of failure to transmit, or if postponed out of such order, of one hundred dollars, to be recovered by the person whose dispatch is neglected or postponed: *Provided, however,* That arrangement may be made with publishers of newspapers, for the transmission of intelligence of general and public interest out of its order, and that communications for and from officers of justice shall take precedence of all others.

Proviso.

Liability for special damages, when.

Sec. 6.—Such associations, corporations, companies or owners, shall be liable for special damages occasioned by failure or negligence of their operators or servants, in receiving, copying, transmitting, or delivering dispatches; and, for the disclosure of any of the contents of any private dispatch to any person other than to him to whom it was addressed, or to his agent, they shall be liable to the sender of the dispatch, and the person to whom it was addressed, in the sum of fifty dollars to each, recoverable by an action before a justice of the peace, and for all special damages in addition thereto; or, for the disclosure of the contents of any private dispatch

to any person other than to him to whom it was addressed, or his agent. *(a)*

Dispatches to be delivered by messenger, when.

Sec. 7.—Such companies or owners shall deliver all dispatches, by a messenger, to the persons to whom the same are addressed, or to their agents, on payment of any charges due for the same: *Provided,* Such persons or agents reside within one mile of the telegraphic station, or within the city or town in which such station is.

To be sent by mail, when.

Sec. 8.—If such persons or agents do not reside as above specified, such companies or owners shall, if so directed, and upon payment of postage, send the same, postage prepaid, by post, to them, to such post-office as may be named.

Railroads may be stockholders in telegraph companies, or may construct telegraphs along their roads.

Sec. 9.—A railroad company may become a stockholder in a telegraph company, or may construct a telegraph to connect two or more points on their railroad. And if such railroad company entirely own such telegraph line, they shall not be bound to telegraph for the public unless they undertake to do so.

Process or notice, how served on telegraph company.

Sec. 10.—Process or notice, served upon any clerk or agent of any telegraph company, at any of the offices of such company, shall be sufficiently served for all purposes whatsoever.

IN THE SUPREME COURT OF MISSISSIPPI

GEORGE M. HODGES, City Tax Collector, APPELLANT

V.

WESTERN UNION TELEGRAPH CO APPELLEE

Note: *The following opinion, rendered by the Supreme Court of Mississippi on May 20, 1895, is taken from 72 Miss. 910, with the syllabus omitted. The note appended on the first page is from 29 L. R. A. 770. The opinion without the reporters' note and summary of arguments of counsel also appears in 18 So. 84.*

Action by the City of Meridian against Western Union Telegraph Company, to recover rent claimed to be due for the use, by the defendant, of the streets of the city for its telegraph poles. The demand is based upon an ordinance of the city passed in June, 1893, requiring all telegraph companies doing business in the city to pay, as rent to the city, the sum of $2.50 per annum for each telegraph pole erected and used in the streets, alleys and public places therein. The sole question presented is the validity of said ordinance. The facts touching this question sufficiently appear in the opinion. The case was tried in the Circuit Court, without a jury, and resulted in a judgment for the defendant.

Cochran & Bozeman for appellant.

The ordinance is copied from an ordinance of the city of St. Louis, the validity of which was sustained in the case

Note: (from 29 L. R. A. 770) That muncipal charges for poles and wires of a telegraph company placed in its streets are not precluded by the interstate character of the business, is shown by **Postal Teleg. Cable Co. v. Baltimore (Md.)** 24 L. R. A. 161, and note. The Maryland case was affirmed by the Supreme Court of the United States in 156 U. S. 210, 39 L. ed. 399. The present case is in no way inconsistent with the doctrine there declared, as it turns on the relation of the municipality to state authority.

of *St. Louis v. Telegraph Company*, 148 U. S. 92. It was conceded that, if the charter of Meridian confers as complete control over its streets as does the charter of St. Louis, appellant should have had judgment. The charter of Meridian gives it full power to keep in repair all necessary streets, alleys, avenues, etc., and to pass all necessary regulations for the same. It gives the city full power to regulate the use of streets. In the said case of *St. Louis v. Telegraph co.*, on rehearing *(149 U. S. 465)*, the court said: "The word 'regulation' is one of broad import. It was a word used in the federal constitution to define the powers of congress over foreign and interstate commerce, and he who reads the many opinions of this court will perceive how broad and comprehensive it has been held to be." The court in that case further says: "Unless, therefore, the telegraph company has some superior right which excludes it from subjection to this control of the city over its streets, it would seem that the power to require payment of some reasonable sum for the exclusive use of a portion of its streets was within the grant of power to regulate the same."

The charter of Meridian further gives the power to pass all ordinances, bylaws and resolution necessary and requisite for the government of said city and the welfare of its inhabitants, provided the same shall not be contrary to the constitution and laws of the state. It seems difficult to frame a provision broader and more sweeping than this. The charter, moreover, empowers the city to grant rights of way to railroad companies for the construction of railways over the streets and through and over the public property of the city. Certainly this is a recognition of the rights as to the streets and public property of the city.

Mayes and Harris, for Appellee.

The case of *St. Louis v. Telegraph Co.*, 148 U. S. 92, is not authority in this case unless it can be shown that the City of Meridian stands upon the same footing as the City of St. Louis, as to its powers.

In that case the court says that the City of St. Louis occupies a unique position. Its powers were not derived by legislative grant, but it framed its own charter under express authority of the people of the state, given in the constitution. Its charter is an organic act, and the City of St. Louis is in a just sense an *imperium in imperio*. On the contrary, the charter of the City of Meridian and the powers of its municipal authorities come directly from the legislature, and the legistlature, so far as regards the rights of the City over its streets, possesses unlimited control. Sec. 15 Am. and Eng. Enc. L. 988; 24 Iowa, 455; 25 N. Y. 526; 27 Ib. 188; 14 Wis. 609; 36 Pa. St., 99; 13 La Ann., 326; 88 Am. Dec. 148; 15 B. Mon. (Ky), 642; 34 Iowa, 249; 80 Ill., 317; 47 Pa. St., 349 45 Iowa, 338; Dill. Mun. Cor., Sec. 702, and cases cited in note; *Meriwether v. Garrett*, 102 U. S., 472. Our constitution does not in any way entrench upon the rights of abutting owners or private individuals whose property is affected by the use of the streets. The act of 1886 makes no provision for compensation to cities, but only provides for compensation where private rights are invaded. The right of the telegraph company, in this case, rests upon express legislative permission to use the streets and public highways without compensation. This is not an attempt to evade paying taxes; these are provided for elsewhere. The demand is for rent in addition to taxes. The judgment should be affirmed.

WHITFIELD, J. The ground upon which the ordinance of the city of St. Louis, of which the one in this case is said to be a copy, is placed in *St. Louis v. W. U. Tel Co.*, 148 U. S.

92, 13 Sup. Ct. 485, and 149 U. S. 465, 13 Sup. Ct. 990, is that the city of St. Louis is the absolute owner of the fee in its streets, and the charter powers of the city are "self-apointed." It is expressly declared that St. Louis occupies "an unique position." "It does not, like most cities, derive its powers by grant from the legislature; but it framed its own charter under express authority from the people of the state, given in the constitution." And again it is said: "This charter is an organic act, —so defined in the constitution, —and is to be construed as organic acts are construed. The city is, in a very just sense, an imperium in imperio. Its powers are self-appointed, and the reserved control existing in the general assembly does not take away this peculiar feature of its charter." Treating the city, therefore, as the absolute and uncontrolled proprietor of its streets, rent, which is like toll, a "demand of proprietorship," and not like a tax, "a demand of sovereignty," was declared to be within the power of the city to exact. Meridian occupies a very different attitude, as to its streets and its power over them. All the power which it has over its streets is derived from the legislature, whose power over them is "supreme and transcendent," to use Judge Dillion's language. We are not advised by the record whether the fee in the streets of Mridian is in the city, or whether the city has a mere easement; but it is not denied that the power of the city to deal with the streets is derived wholly from a charter granted by the legislature, and hence, of course, under legislative control. The legislature, by the act of 1886 (Laws 1886, p. 93) Sec. 1, provided "that any telegraph company, chartered by the laws of this, or any other state of the United States, shall, upon making due compensation, as hereinafter provided, have the right to construct, maintain and operate telegraph lines * * * on across and along all * * * streets, * * " etc., "provided that 'there shall be no interference with the ordi-

nary use of such streets,' etc., or with 'the convenience of any land-owners, more than may be unavoidable." The following sections provide for compensation to turnpike and railroad companies, and private owners, for the use and occupation of their "ways," "structures," or lands. No compensation was provided for cities, in case their streets should be used; but the use and occupation of so much of the streets of cities as may be reasonable needed for the construction and maintenance of telegraph poles and telegraph lines is expressly authorized, without compensation to the state or to the cities, —municipal subdivisions of the state. Without this act the appellee could not have entered upon the streets of the city of Meridian for the purpose of constructing and maintaining its telegraph lines; and under it, it could only have so entered and occupied its streets, with its poles, by virtue of the right of eminent domain, upon due compensation first made, had not the terms of the act clearly shown that such compensation was dispensed with. Had such compensation been required, such damages awarded, in such exercises of the delegated right of eminent domain, such compensation would have been made, such damages awarded, for the use and occupation of said streets by said telegraph company with its poles, wires, etc. And it is this identical use and occupation for which the city seeks here to recover rent under the ordinance in question. The ordinance is entitled: "An ordinance to fix the rent charged telegraph * * * companies * * * for the use of the streets," etc. It is manifest that if the state, having "supreme and transcendent" power over the streets of Meridian, granted the appellee the right to so use and occupy the streets without compensation to the state or the city, then the city of Meridian, a political, municipal subdivision of the state, cannot, by ordinance, affect the license thus granted. It is revocable at the pleasure of the state, but not of the city, unless grant-

ed such power by the state, so far as affects it.

It is to be noted that this is not a tax. The license is a mere permission to enter the streets of the city, and so use and occupy them, without paying the damages usually assessed and paid, when the right of eminent domain is used for condemning rights of way in streets, etc. It is a permissive statute. What it grants is a mere license, revocable by the state. 148 U.S. 102, 13 Sup. Ct. 485. It was not intended to exempt the appellee from the "ordinary burdens of taxation." But this is not a tax, and the scheme for taxation of telegraph companies is elsewhere fully provided. Code 1892, §§ 3880, 3885. And this scheme is directed to be so arranged that "each municipality shall receive its just share of such taxes, proportionately to the amount of property therein situated."

The act conferring the charter powers, it will be noted, was passed prior to the act of 1886, —April 9, 1874. We have nothing to do with the wisdom of the act of 1886, doubtless passed at the instance of telegraph and telephone companies, but, under its provisions, feel constrained to affirm the judgment. See Dill. Mun. Corp. (4th Ed.) § 701 et seq.; *People v. Kerr*, 27 N. Y. 188; *Meriwether v. Garrett*, 102 U. S. 472, 15 Am. & Eng. Enc. Law, 988, and authorities cited.

We are not to be understood as denying or restricting the power of the city to regulate the use of its streets within legal limits. See *Elliott, Roads & S.* pp. 332, 333. This is not an ordinance regulating the use of its wires and poles by the company, nor the use of the streets by the company in the occupation of them by poles, but one exacting a certain sum as rent, pure and simple, from the company, for the identi-

cal entry upon and occupation of the streets by the company, with its poles, which it was authorized by the act of 1886 to make, without compensation to the state or city, in the exercise of the right of eminent domain. The act, it will be observed, provided that such use of the streets must not interfere with their ordinary use as such. In *City of Clinton v. Cedar Rapids & M. R. R. Co.*, 24 Iowa, 469, Dillon, C. J., speaking for the court, says: "By virtue of these charter provisions, and this ownership of the fee, the city claims that it has the exclusive control of the streets, and therefore it may consent to or prohibit as by its common council it shall deem best for the public interest, the use of its streets for railway purposes, and that courts cannot interfere with or control the decision of the common council respecting this matter, whatever that decision may be. If these were all the provisions of the law applicable to this subject, the position of the city might, and, I think, would, be well taken." He then proceeds to notice two other statutes of similar purport with our act of 1886, supra, as affecting this question, and then, at page 473, continues: "But it is a mistake to suppose that when the fee of the streets is in the city, in trust for the public, the city is constitutionally and necessarily entitled to compensation, the same as a private proprietor holding the fee. * * * The constitutional provision is that private property shall not be taken for public use without compensation to the owner. The streets of the city are not the private property of the corporation, in such a sense that the legislature cannot, so far as regards the corporation, authorize the same to be used for any public purpose for which it may see fit, unless it makes compensation to city for such use." We refer specially to the entire reasoning in this case. Of course, the use of the streets by the telegraph company is "subject to all reasonable police and other regulations," in Judge Dillon's language in another

part of this opinion; and, as we have shown, no question of taxation is here involved, nor any private rights of any "landowner." The case of *Donnaher v. State,* 8 Smedes & M. 649, though not referred to by counsel, has not escaped our careful attention. We are disposed to think that the decision in that case may possibly be upheld on the ground that, as urged by the distinguished conusel for appellee, —the late Judge William Yerger, —the charter of the railroad company expressly stipulated that the company could not make its road, "so as to interfere with the passage of any of the public streets of the town"; from which it might have been argued, as he did argue, that the tracks could not be laid in the streets at all, so far as the railroad's charter power to do so was concerned. It would seem that the court, however, went rather on the ground that, as stated in the opinion, "the statute of 1823 reserved to the legislature the right to dispose of the entire two sections of land designated by the commissioners to locate the seat of government, except the streets," etc., and hence that "this vested the title to the streets in the corporation of the city, and deprived the legislature of the power to dispose of them, except so far as the jus publicum, or the right of eminent domain, might authorize it." If the decision is sound, —and it must be remembered that Mr. Justice Thacher dissented, —it is only on the first ground. Otherwise the decision, like the general language of the opinion of the majority of the court, speaking through Mr. Justice Clayton, is justly amenable to the criticism pronounced on it by Judge Dillon in the second volume (fourth edition) of his work on Municipal Corporations (section 701, note 3, p. 834), where he says: "A different view has been sometimes taken. Thus, in *Donnaher v. State,* 8 Smedes & M. 649, the court decided that, where the statute under which a city was laid out vested the title of the streets in the city, such streets cannot be sub-

jected to the use of a railroad, without the consent of the city, unless the damages to the city are assessed and paid. In other words, the legislature can only interfere with the use of the streets of the city by its exercise of the right of eminent domain, and if it exercise this right it must compensate the city. But this conclusion seems to have been adopted without sufficient reflection, and is undoubtedly erroneous"; citing authorities. "The ground on which the city of Jackson stands was given to the state of Mississippi by the general government," as said by Judge Yerger in his brief; and this fact, connected with the "reservation of the right of the legislature to dispose of the entire two sections of land, except the streets." etc., hereinbefore adverted to as emphasized by the court, seems to have confused Judge Clayton, —at least, to have left him with rather indistinct conceptions on the power of the legislature, generally to deal with the streets of a city. For we find him saying (page 660) that "this principal (of compensation being made for private property taken for public use) applies as forcibly to the streets, in this instance, as to private property in other cases"; seemingly holding that the streets of Jackson are its "private property," in the same sense that any individual's property is his "private property." And the case immediately cites *Tuckahoe Canal Co. v. Tuckahoe & J. R. R. Co.*, 11 Leigh, 76, which is one of a canal company against a railroad company; both private (not muncipal) corporations. And a more extraordinary thing still is the announcement, on page 661, that "at present we are strongly inclined to the belief that the owners of lots adjacent to the track of the railroads will have no claim to compensation, because they have no right of soil in the streets," a proposition, the converse of which is everywhere now established law. We are not, of course, saying here anything as to the streets of Jackson, but are merely putting this case of *Donnaher* in its only solvable

light, as to the particular decision therein made, if in that light it be solvable. In so far as the general language of the opinion of the court in that case conflicts with the views herein announced, it is, as said by Judge Dillon, "undoubtedly erroneous," and is to that extent hereby overruled. Affirmed.